

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CAROL A. RAFFERTY

CASE NO. 99-61553

Debtor

Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter comes before the Court for consideration in connection with a motion filed on September 23, 1999, by Carol A. Rafferty ("Debtor"). In her motion, the Debtor took the position that upon conversion of her case from one under chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), to one under chapter 13 of the Code, that the automatic stay, which was previously vacated to allow Residential Funding Corporation ("RFC") to proceed with foreclosure on the Debtor's residence, was reimposed. On October 6, 1999, RFC filed opposition

to the Debtor's motion, contending that the conversion of the Debtor's case did not serve to reimpose the automatic stay.

The motion was heard at the Court's regular motion term in Binghamton, New York, on October 12, 1999, and adjourned to November 16, 1999, in order for the Court to consider the case law cited by the Debtor. On November 16, 1999, the Court orally ruled that conversion of a case from chapter 7 to chapter 13 did not in and of itself result in reimposition of the automatic stay. The Court adjourned the motion to December 14, 1999, to allow the parties to address a tangential argument made on behalf of the Debtor that confirmation of the Debtor's chapter 13 plan, which provided for the curing of the Debtor's default on RFC's mortgages and to which RFC filed no objection, had the legal effect of reinstating the automatic stay. The Court allowed the parties to file memoranda of law, and the matter was submitted for decision on December 31, 1999.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), and (b)(2)(L) and (O).

FACTS

The Debtor filed a voluntary petition ("Petition") pursuant to chapter 7 of the Code on

March 26, 1999. On April 26, 1999, RFC filed a motion for relief from the automatic stay in order to enable it to proceed with the foreclosure of its mortgage on the Debtor's residence. Although an affidavit was filed on behalf of the Debtor in opposition to the relief sought by RFC on May 4, 1999, Debtor's counsel did not appear at the hearing on May 11, 1999. At the hearing, the motion was granted, and the Court signed an Order on May 17, 1999, granting RFC relief from the automatic stay.¹

On August 9, 1999, the Court signed an Order granting the Debtor's application to convert her case to chapter 13.² The Debtor filed a chapter 13 plan ("Plan") on August 11, 1999. According to the notice sent to creditors ("Notice"), the hearing on confirmation of the Plan was scheduled to be held in Binghamton, New York on October 12, 1999. Objections to confirmation of the Plan were to be filed by October 4, 1999. The Notice states that the case was converted from chapter 7. Included in the list of entities served with the Notice is Shapiro & DiCaro, LLP.³

The Plan was approved by the Trustee on November 15, 1999. No objections to the Plan were filed. An Order confirming the Plan was signed by the Court on December 15, 1999. The

¹ According to RFC's Notice of Motion (1) for Summary Judgment (2) to Amend Title and (3) to Appoint a Referee, a hearing was scheduled to be held on December 3, 1999, at a special term of the New York State Supreme Court, County of Tioga, in Owego, New York. At the hearing before this Court on December 14, 1999, RFC's counsel represented to this Court that that motion had been adjourned until January 21, 2000, awaiting the decision of this Court.

² The Order was amended on August 18, 1999, to provide for revocation of the Debtor's discharge which had been granted on August 3, 1999.

³ The Petition identifies Shapiro & DiCaro, LLP, not RFC, as the secured creditor, holding a mortgage on the Debtor's principal residence. The notice sent out originally in the chapter 7 to Shapiro & DiCaro apparently was sufficient notice to cause them to file a motion for relief from the automatic stay on behalf of RFC early on in the case. There has been no argument made on RFC's behalf that the Notice of the hearing on confirmation of the Debtor's chapter 13 plan was not received or that service on Shapiro & DiCaro was inadequate notice as to RFC. *See, e.g.,* Memorandum of Law, filed by Shapiro & DiCaro on January 3, 2000.

Plan provides for payment to RFC of prepetition arrears in the amount of \$11,212.19 over the course of 60 months. It also provides that the balance owed on RFC's mortgage of \$63,024 will be paid by the Debtor outside the Plan. RFC does not dispute that it did not file an objection to the Debtor's Plan.

ARGUMENTS

The Debtor asserts that confirmation of the Plan supersedes the relief previously granted to RFC vacating the automatic stay. It is the Debtor's position that RFC should have sought to incorporate the provision of the Court's Order vacating the stay into the Debtor's Plan or Order of Confirmation and, having failed to do so, is bound by the treatment of its mortgage as set forth in the Plan.

RFC contends that the Court should distinguish the holdings in *In re Garrett*, 185 B.R. 620 (Bankr. N.D. Al. 1995) and *In re Diviney*, 225 B.R. 762 (10th Cir. BAP 1998), two cases cited by the Debtor in support of her position, "in view of the differing facts in the instant case and the public policy considerations which militate in favor of a creditor's ability to foreclose its mortgage in state court proceedings after properly obtaining relief from the automatic stay. Otherwise, by simply converting to a Chapter 13 case, a debtor may evade the effect of a lift stay order." See RFC's Memorandum of Law, filed January 3, 2000, at 3-4.

DISCUSSION

Pursuant to Code § 1327(a), a confirmed plan binds both the debtor and each creditor “whether or not such creditor has objected to . . . the plan.” 11 U.S.C. 1327(a). As long as RFC had notice of the provisions of the Debtor’s Plan, it is bound by its terms, as confirmed. *See In re Walker*, 128 B.R. 465 (Bankr. D.Idaho 1991). The curing of Debtor’s default on the RFC mortgage is clearly provided for in the Plan. RFC’s failure to make a timely objection to confirmation of the Plan results in RFC being deemed to have accepted the treatment of its mortgage claim under the Plan. *See In re Szostek*, 886 F.2d 1405, 1413 (3d Cir. 1989); *In re LaFergia*, B.R. 351, 352 (Bankr. M.D. Fl. 1999). As one court has observed, a secured creditor is “not entitled to stick its head in the sand and pretend it would not lose any rights by not participating in the proceedings.” *In re Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990).

As the court in *Garrett* noted, “[a]n order confirming a chapter 13 plan is *res judicata* as to all justiciable issues which were or could have been decided at the confirmation hearing.” *Garrett*, 185 B.R. at 622 (quoting *Anaheim Savings & Loan Assn. v. Evans (In re Evans)*, 30 B.R. 530, 531 (9th Cir. BAP 1983)). In this case, RFC was granted relief from the automatic stay in the chapter 7 case allowing it to proceed with foreclosure proceedings in the state court with respect to the Debtor’s residence.

RFC contends that because the Debtor’s case was originally filed as a chapter 7 that it is to be distinguished from *Garrett* and *Diviney* in which both debtors therein originally filed chapter 13 petitions. RFC argues that it should not have to monitor a converted chapter 13 case once it has obtained relief from the automatic stay in the prior chapter 7 case to proceed with enforcement of its state law rights.

The fact that the Debtor’s case was originally filed as a chapter 7 and later converted to

a chapter 13 case should not make a difference. The Debtor could just as easily have filed a chapter 13 petition after receiving her discharge in the chapter 7. Under those circumstances, the automatic stay would have been newly imposed as a matter of law. As long as the foreclosure sale had not been completed and the Debtor divested of any rights she had in the real property, she was entitled to propose a plan which addressed the treatment of RFC's mortgage provided that RFC received notice of said treatment. *See* Code § 1322(c)(1).

The Notice provided to Shapiro & DiCaro clearly indicates that the case was converted from chapter 7 to one under chapter 13. It required RFC to examine the proposed treatment of its claim in the Plan and to object to it if it wished to protect its rights under state law and prevent what it describes as the Debtor's attempt to evade the effect of the lift stay Order. *See Pence*, 905 F.2d at 1109 (noting that lending institutions "must follow the administration of the bankruptcy estate to determine what aspects of the proceeding they may want to challenge."). As noted by the court in *Walker*, "while the policy in favor of protecting the rights of mortgage lenders granted by the Code is sound, it must . . . give way to the wisdom of promoting the finality of the Court's confirmation order." *Walker*, 128 B.R. at 468.

Based on the foregoing, the Court concludes : 1) conversion of Debtor's case from chapter 7 to chapter 13 did not reimpose the automatic stay, and 2) the Order confirming Debtor's Plan supercedes the Order vacating the stay and under the terms of the confirmed Plan, RFC is prohibited from continuing with its foreclosure proceeding in state court as long as the Debtor complies with the terms of that Plan. In the event that the Debtor defaults on her plan payments to RFC, RFC may again file a motion seeking relief from the automatic stay for the Court's consideration.

IT IS SO ORDERED.

Dated at Utica, New York

this 19th day of January 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge